

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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## MILLENIUM HOLDING GROUP, INC.,

Plaintiff,

V.

SUTURA, INC. f/k/a TECHNOLOGY VISIONS GROUP, INC.; Successor-In-Interest to SUTURA, INC.; *et al.*

Defendant.

2:05-cv-00356-JCM-LRL

## ORDER

Before the court are defendants Fusion Capital Fund II LLC’s and Fusion Capital Partners LLC’s (collectively “Fusions”) Motion to Compel Discovery (#86), plaintiff’s Opposition (#100), Fusion’s Reply (#102), plaintiff’s Sur-Reply (#116), and Fusion’s Reply to the Sur-Reply (#118); plaintiff’s Motion for Protective Order (#96, 97), Fusion’s Opposition (#105), and plaintiff’s Reply (# 110); and Fusion’s Second Motion to Compel (#107) and plaintiff’s Opposition (#112). The court has considered these motions together because there is an overlap of the issues presented in each.

The court has broad discretion in controlling discovery. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). Relevance within the meaning of Fed. R. Civ. P. 26(b)(1) is considerably broader than relevance for trial purposes. For discovery purposes, relevance means only that the materials sought are reasonably calculated to lead to the discovery of admissible evidence. *See Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978) (citation omitted); Fed. R. Civ. P. 26(b)(1). However, a court may limit discovery if it determines, among other things, that the discovery is unreasonably cumulative or duplicative, obtainable from another source that is more convenient, less burdensome, or less expensive, or the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(2).

1       **I. Document Requests**

2           **A. Document Request No. 17**

3           Fusion seeks details of certain transactions between Richard Ham and Millenium, Carla  
4           Aufdenkamp and Millenium, and Ham Consulting Company and Millenium. Fusion claims these  
5           transactions are relevant to show whether Millenium breached its Agreement and Plan of Merger  
6           ("Agreement") with Sutura.

7           Millenium opposes the production based on over breadth and relevancy. In its Amended  
8           Complaint (#46), Millenium alleges that Fusion wrongfully accused it of breaching the Agreement.  
9           (Amended Complaint (#46) at ¶ 58.) Fusion has a right to discovery relevant to its defense against this  
10           allegation. *See* Fed. R. Civ. P. 26(b)(1).

11           Millenium also argues that no further production is needed because Fusion is "fully informed  
12           of the details of the transactions referred to in Request 17 . . ." (Opp'n (#100) at 3.) A party cannot  
13           refuse to produce discovery materials because it happens to believe the opposing party has everything  
14           it needs to answer its questions. Fusion is entitled to all responsive, non-privileged, documents.

15           The request is overbroad in that it asks for relevant documents from "any time period." The  
16           documents are relevant to Fusion's defense that it believed Millenium breached the Agreement.  
17           Consequently, only transactions prior to the termination of the Agreement are relevant. Any  
18           transactions post-dating termination are not relevant. Millenium shall produce relevant documents for  
19           the period from February 15, 2000, the date the first transaction in question took place, through the  
20           termination date of the Agreement.

21           **B. Document Request No. 18**

22           Only the tax liability portion of this request appears relevant to whether Millenium breached the  
23           Agreement. While Fusion may believe the relationships between the named players at Millenium are  
24           relevant, it did not explain such significance in its Motion.

25           Again, Millenium claims that "Fusion has the information" necessary to show whether it  
26           breached the Agreement. (*Id.* at 4.) And, again, this argument fails. If there any further documents

1 relevant to Millenium's tax obligations under §§ 5.9 and 5.12 of the Agreement, Millenium shall  
 2 produce them. Because relevance is based on Millenium claim that Fusion wrongfully accused it of  
 3 breaching the Agreement, only tax obligations prior to the termination of the Agreement are relevant.

4 **C. Document Request No. 19**

5 The parties agree that the audits have now been produced. (Reply (#102) at 9.) Fusion asks the  
 6 court to compel production of the remainder of its Request, to wit, the communications between  
 7 Millenium and its auditors. Millenium previously claimed accountant-client privilege but failed to  
 8 produce a privilege log. Fusion argues that this privilege is now waived, but the court rejects such an  
 9 extreme sanction because Millenium timely objected—even if it did not argue the point in its  
 10 Opposition.

11 The party asserting a privilege has the burden of making a *prima facie* showing that the  
 12 information being withheld is indeed privileged. *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157  
 13 F.R.D. 691, 698 (D. Nev. 1994). If Millenium withholds any documents on the basis of privilege, it  
 14 must provide a detailed privilege log. *See Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 121  
 15 (D. Nev. 1993). A failure to comply with privilege log requirements will result in a finding that  
 16 discovery opponents have failed to meet their burden of establishing the applicability of the privilege.  
 17 *See Allendale Mutual Ins. Co. v. Bull Data System, Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992).

18 **1. Fusion's Second Motion to Compel**

19 This Motion to Compel concerns documents subpoenaed from nonparty accounting firms  
 20 Chavez & Koch and DeJoya Griffith & Co. Fusion requested, from both firms, all documents related  
 21 to audits of Millenium from fiscal years 2002 through 2005, and all documents related to any other  
 22 review of the financial books and records of Millenium for the fiscal years 2002 through 2005. The  
 23 accounting firms did not object; rather, they forwarded the documents to Millenium's counsel to review  
 24 for privileged information. Millenium withheld the accounting firm's documents from 2002, 2003, and  
 25 2005 on relevancy grounds.

26 Fusion argues procedural error because the nonparties failed to timely object to the subpoenas

1 and Millenium failed to file a request for a protective order. Thus, Fusion contends that Millenium or  
 2 the accounting firms must produce the subpoenaed documents. Millenium replies that the court already  
 3 has the matter under consideration in connection with Fusion's first Motion to Compel and therefore  
 4 the court need not address another motion covering the same discovery material. The problem is that  
 5 Millenium never objected to the audits or the communications based on relevancy in its discovery  
 6 responses or its Opposition (#100); it objected only on the basis of accountant-client privilege. And,  
 7 the nonparty accounting firms did not object at all. *See Fed. R. Civ. P. 45(c)(2)(B).*

8 A nonparty's failure to timely object to a Rule 45 subpoena duces tecum generally requires the  
 9 court to find that all objections are waived. *McCoy v. Southwest Airlines Co.*, 211 F.R.D. 381, 385  
 10 (C.D. Cal. 2002) (citations omitted). Similarly, if Millenium wished to prevent disclosure, a motion  
 11 for a protective order or to quash the subpoena would be required. *Id.* at 384 (citations omitted). Under  
 12 Rule 26(c), however, the court may *sua sponte* issue a protective order for good cause shown. *Id.* at 385  
 13 (citation omitted). Because the discovery requested is tied by subject matter to Fusion's Motion to  
 14 Compel (#86), the court will allow Millenium to sort through the documents for privileged material.

15 Millenium has all of the documents produced by the accounting firms. To prevent any  
 16 additional burden on the nonparties, Millenium shall produce all documents it received from the  
 17 accounting firms for which it does not claim a privilege. For those documents as to which it claims a  
 18 privilege, Millenium will produce a privilege log.

19 **D. Document Request No. 20**

20 First, Fusion claims it is entitled to any and all lists of Millenium stockholders during the period  
 21 June 2004 and December 2004 as a right granted to shareholders under Nev. Rev. Stat. 78.105. The  
 22 statute provides that stockholders who hold at least five percent of a corporation's outstanding shares,  
 23 among other requirements, are entitled to inspect shareholder lists. *See Nev. Rev. Stat. 78.105.*  
 24 Millenium claims that Fusion owns only about one percent of Millenium shares, and Fusion has not  
 25 refuted this claim. Thus, the statute is inapplicable.

26 The request, however, is relevant to the alleged breach of Agreement §§5.5 and 5.6. Millenium

1 shall produce a list of stockholders during the period June 2004 through December 2004, or documents  
2 that contain the information.

3 **E. Document Request No. 23**

4 Millenium asserts that it has produced all responsive documents to Fusion's request for any  
5 valuation of Millenium. (Opp'n (#100) at 6.) Millenium refers to documents it produced regarding  
6 market capitalization, but not "any other valuation." If there are documents that reflect other valuations  
7 of Millenium for the indicated time period, Millenium shall produce them.

8 **II. Millenium's Motion for Protective Order (#96,#97)**

9 Millenium requests this court to issue a protective order to preclude production of documents  
10 subpoenaed from its stock transfer agent, Computershare Trust Company, Inc. The law confers "broad  
11 discretion on the trial court to decide when a protective order is appropriate and what degree of  
12 protection is required." *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) (citing  
13 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 38 (1984)). A party opposing discovery may file a motion  
14 seeking a protective order, which may be granted upon a showing of good cause in order to prevent  
15 annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c). "[T]he  
16 party seeking protection bears the burden of showing specific prejudice or harm will result if no  
17 protective order is granted." *Phillips*, 307 F.3d at 1210–11.

18 Millenium states that the subpoena duces tecum "is designed to inflict on plaintiff the very  
19 annoyance, embarrassment and oppression that protective orders under Rule 26(c) are to prevent."  
20 (Mot. (#97) at 4). It fails, however, to show the specific prejudice and harm that would result in the  
21 absence of a protective order. Rather, it makes the same relevancy arguments that it made opposing  
22 Fusion's Motion to Compel (#86).

23 The request is relevant to the alleged breach of the Agreement §§5.5 and 5.6. The request,  
24 however, is too broad. Under Fed. R. Civ. P. 45(c)(3)(A), an evaluation of undue burden requires the  
25 court to weigh the burden to the subpoenaed party against the benefit of the information to the serving  
26 party. *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (citation omitted). One factor

1 to consider is the breadth of the document request. *Id.* (citations omitted). All documents related to  
2 every transaction are not necessary to the inquiry. Rather, Computershare Trust shall produce a ledger  
3 of purchases, sales, and transfers. If there is a discrepancy between the ledger and the Agreement's  
4 schedules, then Millenium will be entitled to documents surrounding the specific discordant transaction.

5 **III. Sanctions**

6 Fusion asks this court to award it the fees and costs associated with bringing the instant Motion,  
7 because Millenium's objections were not substantially justified. "Substantially justified" means that  
8 reasonable people can differ as to the appropriateness of the contested action. *Pierce v. Underwood*,  
9 487 U.S. 552, 565 (1998). Because the court limited Fusion's requests, the court finds that Millenium  
10 was substantially justified in resisting discovery.

11 Accordingly, and for good cause shown,

12 IT IS ORDERED that Defendant and Counter-Plaintiff Fusion Capital Fund II LLC's and  
13 Defendant Fusion Capital Partners LLC's Motion to Compel Discovery (#86) is GRANTED to the  
14 following extent:

15 (1) Millenium shall respond to Document Request No. 17 for the period February 14, 2000  
16 through the termination date of the Agreement;

17 (2) Millenium shall respond to Document Request No. 18 in regard to its tax obligations under  
18 the Agreement that predate its termination;

19 (3) Millenium shall produce a privilege log for any documents it withholds in response to  
20 Document Request No. 19;

21 (4) Millenium shall respond fully to Document Request No. 20;

22 (5) Millenium shall respond to Document Request No. 23 to the extent the documents relate to  
23 any valuation performed, other than market capitalization, for the period November 1, 2004 through the  
24 present;

25 IT IS FURTHER ORDERED that Plaintiff's Rule 26(c) Motion for a Protective Order (#96, 97)  
26 is GRANTED to the extent Computershare Trust shall produce a ledger of purchases, sales, and

1 transfers for the period April 1, 2004 through December 31, 2004.

2 IT IS FURTHER ORDERED that Defendant and Counter-Plaintiff Fusion Capital Fund II  
3 LLC's and Defendant Fusion Capital Partners LLC's Second Motion to Compel Discovery (#107) is  
4 GRANTED. Millenium shall produce all non-privileged documents it received from the firms Chavez  
5 & Koch and DeJoya Griffith & Co. Millenium shall produce a privilege log for all documents it  
6 withholds as privileged.

7 IT IS FURTHER ORDERED that Millenium shall comply with the requirements of this order  
8 by February 9, 2007.

9 DATED this 10<sup>th</sup> day of January, 2007.

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11 **LAWRENCE R. LEAVITT**  
12 **UNITED STATES MAGISTRATE JUDGE**

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